

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling**

GARRY DAVID GALLARDO,

Plaintiff,

v.

CIVIL ACTION NO. 5:21-CV-134
Judge Bailey

LIEUTENANT B. KINDER,
M. STOVER, S.L.N. Teacher,
A. WALLACE, Education Technician,
M. GYURKE, Disciplinary Hearing Officer,
W. VAN DEVENDER, S.I.S. Technician,
J. C. PETRUCCI, Regional Director,
B.O.P. Mid-Atlantic Region,
IAN CONNORS, Administrator, National
Inmate Appeals,

Defendant.

ORDER ADOPTING REPORT AND RECOMMENDATION

The above referenced case is before this Court upon the magistrate judge's recommendation [Doc. 8], filed August 10, 2021. Therein, the magistrate judge recommends the case be dismissed without prejudice pursuant to the three strikes provision of 28 U.S.C. § 1915(g); further, the magistrate judge recommends that the Motion to Proceed *in forma pauperis* [Doc. 2] be denied, and the pending Motion for Leave to File Excess Pages [Doc. 5] and the Motion for Leave to File Memorandum of Points and Authorities in Support [Doc. 6] be denied as moot.

The Report and Recommendation ("R&R") found that plaintiff has filed at least three prior civil cases that qualify as strikes under § 1915(g). Accordingly, to proceed in this case without prepayment of the filing fee, plaintiff must plausibly allege that he is under imminent

danger of serious physical injury. The magistrate judge concluded plaintiff had not met this exception because the unconstitutional conduct alleged in the complaint does not allege any immediate danger of serious physical injury.

This Court is charged with conducting a *de novo* review of any portion of the magistrate judge's report to which a specific objection is registered, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). However, absent prompt objection by a dissatisfied party, it appears that Congress did not intend for the district court to review the factual and legal conclusions of the magistrate judge. **Thomas v. Arn**, 474 U.S. 140 (1985). Additionally, any party who fails to file timely, written objections to the magistrate judge's report pursuant to 28 U.S.C. § 636(b)(1) waives the right to raise those objections at the appellate court level. **United States v. Schronce**, 727 F.2d 91 (4th Cir. 1984), *cert. denied*, 467 U.S. 1208 (1984).

Here, objections were filed on August 20, 2021. [Doc. 11]. Therein, plaintiff raises three arguments objecting to the magistrate judge's findings. First, plaintiff argues that as a convicted sex offender he is always facing imminent danger of serious physical injury from other inmates; he cites previous incidents and asserts that "a sex-offender in prison is always in danger of serious physical injury." [Doc. 11 at 2]. This Court finds this objection unpersuasive. The danger presented by other inmates is unrelated to the constitutional violations alleged in the instant case, which are directed at prison staff and relate to the confiscation of plaintiff's personal notebooks and the ensuing disciplinary proceedings. This objection is overruled and the Court finds that plaintiff cannot meet the exception to § 1915(g). As to plaintiff's second "objection," plaintiff argues his claims should go before

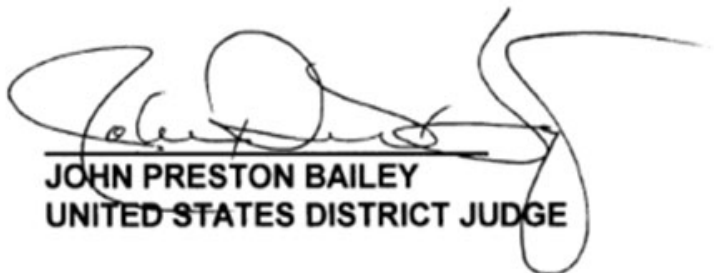
a jury and elaborates on his underlying arguments that prison staff violated his First Amendment rights. As the objection does not direct this Court to any error made by the magistrate judge, it is overruled.

Accordingly, the Report and Recommendation [**Doc. 8**] is hereby **ORDERED ADOPTED** for the reasons more fully stated in the magistrate judge's report. Accordingly, plaintiff's objections [**Doc. 11**] are hereby **OVERRULED**. The Motion for Leave to Proceed *in forma pauperis* [**Doc. 2**] is hereby **DENIED**, and the Motion for Leave to File Memorandum in Support in Excess Pages [**Doc. 5**] and Motion for Leave to File Memorandum of Points and Authorities in Support [**Doc. 6**] are hereby **DENIED AS MOOT**. This case is hereby **DISMISSED WITHOUT PREJUDICE**. Plaintiff is advised that if he wishes to pursue the allegations raised in the Complaint, he must initiate a new case by filing a complaint with payment of the \$402 filing fee. The Clerk is directed to enter judgment in favor of defendants and **STRIKE** this case from the active docket of this Court.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to any counsel of record herein and to mail a copy to the *pro se* plaintiff.

DATED: September 2, 2021.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE